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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1928.

No. 81

EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LTD., OF LONDON, ENGLAND, PETITIONER,

versus

MRS. MYRTIS COOK ET AL., RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

EMPLOYER'S LIABILITY ASSURANCE CORPORATION, LTD., OF LONDON, ENGLAND,
The Above-mentioned Petitioners,
By W. A. VINSON,
CLYDE A. SWEETON,
Its Solicitors.

VINSON, ELKINS, SWEETON & WEEMS,
Of Counsel.

(34,194)

SUBJECT INDEX.

Petition for writ of certiorari:

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1928.

No. 885

EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LTD., OF LONDON, ENGLAND, PETITIONER,

versus

MRS. MYRTIS COOK ET AL., RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Supreme Court of the United States:

Now comes Employers' Liability Assurance Corporation, Ltd., of London, England, and petitions for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit to review its decision of that Court.

Petitioner exhibits herewith the necessary certified copies of the pleadings, transcript of record filed in the

Circuit Court of Appeals, said transcript embracing also all of the proceedings of that Court. Petitioner presents herewith an accompanying and supporting brief.

The Respondents are Mrs. Myrtis Cook and Geraldine Cook, a minor. The solicitors of record for Respondents are Sam C. Polk and Polk & Allen, of Houston, Texas.

In support hereof Petitioner represents:

I.

Summary and Short Statement of the Matters Involved.

A. Amount Involved.

The amount involved, without interest, is $7,200.00 (R. 16).

B. Basis of the Suit.

At the time this suit was filed, Respondents, Mrs. Myrtis Cook and Geraldine Cook, a minor, were the surviving wife and child, respectively, of Hal Cook, deceased.

Hal Cook had been working for the Ford Motor Company for a period of more than three (3) years prior to his death on March 28th, 1928.

Petitioner had issued to the Ford Motor Company a Texas Workmen's Compensation Policy of insurance covering such of its employees as were within the scope of the Workmen's Compensation Act, which policy was in effect at the time of the alleged injuries to the deceased, Hal Cook.

The Ford Motor Company had a branch plant in Houston, Texas, where it assembled Ford automobiles. Its domicile and principal place of business was in Detroit, Michigan, and it owned and operated two vessels upon the high seas for the purpose of transporting its automobile parts and accessories to its various branch plants, including the Port of Houston, Texas.

The greater portion of the deceased's duties were performed in the assembling plant and a very small per cent of his duties were performed in unloading vessels. However, he signed an employment slip obligating himself to do any work within the jurisdiction of his employer, and at the time of the alleged injury he was actually in the hold of a vessel anchored in navigable waters of the United States.

It was claimed by Respondents that deceased received a strain while unloading automobile parts which produced thrombosis (blood clot) of the mesenteric veins, which caused secondary anemia, the primary cause of his death. There was no positive testimony that he strained himself and no positive testimony that he sustained a thrombosis of the mesenteric veins.

C. Proceedings in the United States District Court.

Suit was brought by Mrs. Myrtis Cook, individually and as next friend of her minor daughter, Geraldine Cook, as beneficiaries of Hal Cook, deceased, against Petitioner, pursuant to the Texas Workmen's Compensation Act to recover three hundred and sixty (360) weeks' compensation at the rate of twenty dollars ($20.00) per week (R. 1 to 5).

All jurisdictional requirements prescribed by the Texas Workmen's Compensation Act were alleged by Respondents; and also that Petitioner had issued a policy of Workmen's Compensation Insurance to Ford Motor Company, the employer of the deceased, Hal Cook, which was in force and effect on the date of the death of deceased, Hal Cook (R. 2 to 6).

It was alleged by Respondents that on or about January 26th, 1927, while engaged in the performance of his contract of employment with the Ford Motor Company, he was instructed to assist in unloading a vessel belonging to his employer, Ford Motor Company, then anchored at the wharf at Houston Ship Channel at Houston, Texas, and while so engaged in unloading the cargo from said ship, consisting of automobiles and various parts of automobiles, he received a severe strain which resulted in serious injuries; that following the strain he was operated on for varicocele veins and died on or about March 28th, 1928 (R. 3 and 4).

The Petitioner filed a plea to the jurisdiction on the ground that deceased, Hal Cook, was injured while performing services on a vessel anchored in navigable waters and, therefore, the cause was referable exclusively to the maritime jurisdiction of the United States District Court; and subject to its plea to the jurisdiction, it filed a general denial (R. 12 to 15).

Said cause came on for trial the 25th day of April, 1928, and on April 26th, 1928, the jury returned a verdict in favor of Respondents upon which judgment was entered against Petitioner for the sum of $7,200.00, being 360 weeks' compensation at the rate of $20.00

per week, the maximum provided by the Texas Workmen's Compensation Act.

D. Proceedins in the Circuit Court of Appeals.

On July 9th, 1928, Petitioner served personal notice upon Respondents that it was appealing from the judgment, which notice was filed with the Clerk of the United States District Court on July 11th, 1928 (R. 23), and on July 11th, 1928, Petitioner filed petition for appeal, which was by the District Court on the same day allowed and supersedeas bond fixed at ten thousand dollars ($10,000.00) (R. 25 to 27).

Assignments of Error were filed on July 11th, 1928 (R. 81). Supersedeas Bond was approved and filed on July 11th, 1928 (R. 83 and 84). On July 11th, 1928, Bill of Exception was approved and filed (R. 80).

On March 29th, 1929, the Circuit Court of Appeals for the Fifth Circuit affirmed the judgment of the District Court holding Petitioner's Assignments of Error without merit (R. 93). Justice Foster dissented (R. 93). Petition for Rehearing was filed in said Court on the 11th day of April, A. D. 1929 (R. 95), which was overruled by the Court on April 23rd, A. D. 1929 (R. 99).

Petitioner filed an application for stay of mandate and execution for the purpose of applying to this Court for Writ of Certiorari (R. 99). On the 24th day of April, A. D. 1929, one of the Judges of the Circuit Court of Appeals entered an order staying the man-

date of that Court until the 24th day of May, 1929 (R. 100-101).

E. Errors of the Circuit Court of Appeals Complained of by Petitioner.

The United States Circuit Court of Appeals for the Fifth Circuit erred:

1. In holding that the Texas Workmen's Compensation Act, providing for compensation for accidental injuries and death to employees applied where the deceased employee sustained an accidental injury while in the hold of a vessel unloading the same, which vessel was lying in navigable waters and while said employee was engaged in the performance of a maritime act and within the scope of his employment, because the said cause of action, if any, was exclusively within the maritime jurisdiction of the United States District Court.

2. In holding that there was evidence of more than a scintilla showing that the deceased employee received an accidental injury within the course of his employment which resulted in his death.

II.

Summary of General Reasons Relied on for Allowance of the Writ.

1. The holding of the Circuit Court of Appeals that Title 130 of the Revised Civil Statutes of Texas, 1925, known as the Texas Workmen's Compensation Act, was valid and applicable to this case is in conflict with

and repugnant to Article 3, Section 2, of the Constitution, extending the judicial power of the United States "to all cases of admiralty or maritime jurisdiction." (See Brief.)

2. The decision of the Circuit Court of Appeals for the Fifth Circuit is not supported by the decisions of the Supreme Court or of any Circuit Court of Appeals of any other circuit. (See Brief.)

3. The dissenting opinion of Justice Foster is in harmony with Article 3, Section 2, of the Constitution and the decisions of the Supreme Court and should be declared as the law in the case at bar.

WHEREFORE your Petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding the said Court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of said Circuit Court of Appeals in the said case therein, which was entitled in that Court (Employers' Liability Assurance Corporation, Ltd., of London, England, Appellant, *versus* Mrs. Myrtis Cook *et al.*, Appellees,) to the end that said case may be reviewed and determined by this Court as provided in Judicial Code, Section 240, and that petitioner may have such other and further relief or remedy in the premises as to this Court may seem appropriate and in conformity with said Act, and that said judgment of the Circuit Court of Appeals of said case may be reversed by this Hon-

orable Court and judgment rendered for Petitioners; or, in the alternative, that the judgment of the Circuit Court of Appeals be reversed and remanded for new trial.

Respectfully submitted,

WM. A. VINSON,
CLYDE A. SWEETON,
Solicitors for Petitioner.

VINSON, ELKINS, SWEETON & WEEMS,
Of Counsel.

THE STATE OF TEXAS,
County of Harris:

I, Clyde A. Sweeton, being duly sworn, do hereby say that I am one of the counsel for the Petitioners; that I prepared the foregoing Petition, and that the allegations thereof are true as I verily believe.

I also certify that in my opinion the petition is well founded, and that the case is one in which the prayer of the petitioner for certiorari should be granted.

CLYDE A. SWEETON.

Subscribed and sworn to before me by Clyde A Sweeton, this the 27th day of April, A. D. 1929.

[SEAL.] E. D. ADAMS,
Notary Public in and for Harris County, Texas.